

## Kim (Migration) [2017] AATA 1866 (5 October 2017)

### DECISION RECORD

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| <b>DIVISION:</b>          | Migration & Refugee Division                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>APPLICANT:</b>         | Ms Sun Ae Kim                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>CASE NUMBER:</b>       | 1617291                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>DIBP REFERENCE(S):</b> | BCC2015/2421876                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>MEMBER:</b>            | Adrienne Millbank                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <b>DATE:</b>              | 5 October 2017                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>PLACE OF DECISION:</b> | Brisbane                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <b>DECISION:</b>          | <p>The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:</p> <ul style="list-style-type: none"><li>• cl.820.211 of Schedule 2 to the Regulations</li><li>• cl.820.221 of Schedule 2 to the Regulations.</li><li>•</li><li>•</li><li>•</li><li>• Statement made on 05 October 2017 at 5:29pm</li></ul> |

### CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Genuine relationship – Continual relationship – Joint financial resources – Commitment to shared life

### LEGISLATION

*Migration Act 1958*, ss 5F, 5CB, 65

*Migration Regulations 1994*, r 1.15A, Schedule 2, cl 820.211, 820.221

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 12 October 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 21 August 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The Delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a). The Delegate did not consider the evidence and information provided sufficient to demonstrate that the applicant was the spouse or de facto partner of the sponsor as defined under section 5F and 5CB of the Migration Act.
4. The applicant appeared before the Tribunal on 27 September 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and two supporting witnesses, the sponsor's brother and employer. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### BACKGROUND

7. The applicant was born in Seoul, South Korea, in 1984. She first arrived in Australia on 29 January 2013 on a Working Holiday visa. On 16 December 2013 she applied for a Student (subclass 570) visa onshore. She studied English in 2014 and departed Australia on 29 January 2015. On 27 February 2015 she returned on a Student (subclass 572) visa, enrolled in a certificate-level course in Hospitality and Tourism. While enrolled to study she worked part-time as a receptionist at a massage shop. At time of decision she was working full-time in a Sushi restaurant in Brisbane.
8. The sponsor was born in India in 1985. He arrived in Australia in 2008 on a Student visa, and obtained a Diploma in Hospitality and Cooking. He worked as a chef while on a Temporary (Subclass 457) visa, and was granted an Employer Nominated (subclass 186) visa on 18 February 2015. At time of decision he was working as a chef in a Brisbane restaurant.
9. The parties claim they first met on 31 March 2013 at a party at the house of a mutual friend. They claim they entered into a committed relationship on 30 January 2014. They married in Brisbane on 11 August 2015.
10. The parties travelled together to India and South Korea from 1 December 2016–31 January 2017, and held traditional wedding ceremonies and receptions in both countries.

## **CONSIDERATION OF CLAIMS AND EVIDENCE**

11. The issue in the present case is whether the applicant and the sponsor were in a genuine relationship at the time of application and this decision.
12. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
14. The parties provided a copy of their Queensland Marriage Certificate, certifying that they married in Brisbane on 11 August 2015. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

## **ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?**

### ***FINANCIAL ASPECTS OF THE RELATIONSHIP***

15. The parties provided copies of transactions from April 2015 to August 2017 from their joint operational and savings bank accounts. The records of transactions show numerous transfers to and from other bank accounts. They also show that the accounts have been used for joint savings and for the running of a household, with regular payments for rental, groceries and utilities bills.
16. At hearing the parties described how they organised and managed their finances, through personal accounts, credit cards attached to these accounts, and two joint accounts. Each when questioned separately described the same arrangements. Each demonstrated familiarity with each other's incomes and described how these incomes have been pooled into a common budget and used for common purposes, including travel and weddings.
17. Evidence was provided that the parties have a car registered and insured in joint names, and at hearing they described the purchase of significant furniture and white-goods in early 2016 when they set up house in the sponsor's brother's newly-built home in Griffin.

### ***NATURE OF THE HOUSEHOLD***

18. Mail including tax assessment notices and internet and utilities bills has been sent to the parties at the same addresses in Lutwyche, Newmarket and Griffin in 2015, 2016 and 2017.
19. In a statutory declaration signed 11 August 2016 the sponsor's brother declared that the parties have, as a couple, shared his and his wife's residence in 2014 and from early 2016. The sponsor's older brother as a witness at hearing stated that he arrived in Australia a year earlier than his brother, and that his brother moved in with him on arrival.

20. In their relationship statement at the time of application the parties stated that the applicant moved out of the sponsor's brother's Lutwyche residence in October 2014, and that the sponsor for a period shared his time between the studio she was living in in Newmarket and his brother's residence. The parties explained that relatives from India came to stay in October 2014 and wouldn't have considered it appropriate for the parties to be cohabitating without being married. They stated that the apartment that the sponsor's brother and wife were renting had only two bedrooms. The sponsor testified that for a period he shared his time between the studio in Newmarket and his brother's house, spending a few nights a week in each, and that after the parties were married in August 2015 he moved officially, as a joint tenant, into the Newmarket studio. The parties stated that when the rental agreement on the Newmarket studio expired in November 2016 they returned to live in the sponsor's brother's apartment in Lutwyche.
21. The sponsor's brother at hearing described the house he has built in Griffin, into which the parties moved in May 2016, as designed to share with family: it has five bedrooms, and separate living quarters. The applicant described how she and the sponsor have their own kitchen and living area, which they furnished and equipped themselves. The parties both talked at hearing about how family was important to them but of how they wanted and were and saving for their own home, which the sponsor wants to build.
22. The parties stated that the sponsor does much of the cooking for the household, and that the housework is shared.

#### ***SOCIAL ASPECTS OF THE RELATIONSHIP***

23. Statutory declarations and written declarations attesting to the genuineness of the relationship were provided by the parties' parents, siblings, friends and colleagues.
24. Several of the declarants, including the sponsor's employer, declared that they mix with the parties socially, sharing meals and joining family gatherings on occasions such as Christmas and birthdays. The applicant stated that the parties meet up with their friends about once a week, and that they often invite friends around to share meals that the sponsor cooks.
25. Many photos were provided prior to the hearing of the parties' three weddings, showing the parties during the ceremonies and at receptions in India and South Korea with family members and friends. The parties advised that about 100 guests attended the wedding reception in India, and about 50 in South Korea. Many more photos of the weddings and of the parties with family members and friends on other occasions during their overseas trips and in Queensland including at the Gold Coast or Brisbane's Southbank, were shown at hearing.

#### ***NATURE OF PERSONS' COMMITMENT TO EACH OTHER***

26. The applicant joined the sponsor in India for his brother's wedding in 2014, where she met family members and decided she wanted a traditional Indian wedding. She stated that the sponsor wanted a dress-up wedding in Korea after seeing videos of weddings in that country. The sponsor's brother at hearing stated that the sponsor is the youngest and it was the family's last opportunity for a traditional wedding, and so they made the most of it. The applicant stated that the parties had only a small civil ceremony in Australia, which was organised in order to get the visa application process underway. She stated that both she and the applicant wanted to marry according to traditional and religious custom in front of their families and friends, and that she considered it important, in recognition of their different cultural backgrounds, to hold traditional weddings in both India and South Korea.

27. At the time of decision the parties have been in a relationship for four years and have been married for over two years. It was pointed out at hearing that they have been married three times.
28. The parties presented at hearing as caring and supportive of each other, as sharing a sense of humour, and as articulate in communicating, including with each other, despite the applicant's hesitancy in English. The applicant speaks passable English, and the sponsor speaks English fluently. They described how they work as a couple to maintain connection with each other's families in India and South Korea. The applicant described how the sponsor has taken time from his busy work-place to accompany her to hospital appointments, where he interprets her English into better English.
29. The applicant described herself as a positive person and the sponsor as someone who assumes responsibility for everything, including her well-being. The sponsor talked of how he has drawn on the applicant's positivity and support at times when he has been stressed and anxious.
30. Each of the parties has listed the other as 100 per cent beneficiary in their superannuation accounts.
31. The sponsor stated that he was looking forward to some certainty in his life. He said he had worked hard to establish himself in Australia, and that if necessary, should the visa application not be successful, he would work hard in South Korea or India to build a future for his wife and himself. The applicant stated that she was regretful that she didn't have all the paperwork that was required at the time of application.

#### **OTHER RELEVANT ISSUES**

32. The Tribunal found the witnesses to be open and convincing in the testimony they provided at hearing. The sponsor's brother provided a history of the family's living arrangements in Australia and described how the applicant has become part of the extended family. The Tribunal was impressed that the sponsor's employer, who manages a busy Brisbane restaurant, spent a morning attending the hearing as a supporting witness. The sponsor's employer testified that the sponsor is hard-working, high-achieving and responsible. He testified that he has observed the sponsor to be committed to his wife and his relationship. He described incidents where the sponsor has suffered heart problems, which he thought could be related to stress.
33. More evidence and information was provided to the Tribunal than was available to the Delegate, and the Tribunal has had the opportunity to observe the parties and take further evidence from witnesses at hearing.

#### **FINDINGS**

34. The Tribunal is satisfied that the parties' financial resources have since early 2015 been pooled into joint living expenditure and savings towards joint goals. The Tribunal accepts that the parties have lived together as a spousal couple since their marriage on 11 August 2015. The Tribunal is satisfied that the parties are recognised and related to as a married couple by family and friends in India and South Korea as well as Australia, and that they function socially as a couple. The Tribunal is satisfied that the parties provide companionship and emotional support to each other, and that they see their relationship as long-term.
35. Having considered all the evidence against r.1.15A(3) matters the Tribunal finds that the parties have a mutual commitment to shared life to the exclusion of others; that they are in a genuine and continuing relationship; and that they live together.

36. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of the visa application and the time of this decision.
37. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.
38. Both of the parties are over 18 years of age; the sponsor is the spouse of the applicant; and the applicant was the holder of a substantive visa at the time of application.
39. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

## **DECISION**

40. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
  - cl.820.211 of Schedule 2 to the Regulations
  - cl.820.221 of Schedule 2 to the Regulations

Adrienne Millbank  
Member

## ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

### 1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).